QUESTIONS PRESENTED

1. Whether a presumption of vindictiveness attaches when the trial judge grants the defendant's motion for new trial, the defendant elects to be sentenced by the judge, and the judge imposes a higher sentence than that imposed by the jury at the first trial.

2. Whether a presumption of vindictive sentencing can be rebutted by reliance for an increased sentence on evidence of a defendant's conduct prior to his first trial which is adduced at his second trial.

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STATEMENT

1. Following a jury trial, Respondent was convicted of murder, in violation of Texas Penal Code Ann. § 19.02 (Vernon 1974). Pursuant to Tex. Code Crim. Proc. Ann. art. 37.07 (Vernon 1981 & Supp. 1985), Respondent elected to be sentenced by the jury that decided his guilt. The jury imposed a sentence of 20 years imprisonment. Thereafter, Respondent filed a motion for new trial, alleging improper jury argument and improper cross-examination by the prosecutor (J.A. 17-18). The judge granted the motion.

In December 1980, Respondent was retried before a new jury, but with the same judge presiding, and he was once again convicted of murder. This time, however, Respondent elected to be sentenced by the trial judge, who imposed a sentence of 50 years' imprisonment. Respondent moved for the entry of findings of fact explaining the increased sentence, which the judge did (J.A. 33-35), although first expressing her conclusion that the prophylactic rule of *North Carolina* v. *Pearce*, 395 U.S. 711 (1969), was not applicable "because the defendant voluntarily elected to have the jury, rather than the judge, set punishment at the first trial" (J.A. 33).

The judge nevertheless went on to place on the record certain findings in the event the appellate court disagreed with her on the applicability of *Pearce*. She relied principally on "newly developed evidence" that was presented for the first time at the second trial. The judge specifically focused on the testimony of two new witnesses, Carolyn Sue Hollison McCullough and Willie Lee Brown, which "directly implicated the [Respondent] in the commission of the murder in question and showed what part he played in committing the offense" (J.A. 33). The judge found that their testimony "shed new light upon the [Respondent's]

life, conduct, and his mental and moral propensities" and provided "insight as to * * * [Respondent's] propensity to commit brutal crimes against persons and to constitute a future threat to society" (J.A. 34). The judge also noted that she learned for the first time at the second trial that Respondent had been released from prison only four months before the crime occurred (ibid.). The judge further observed that Respondent had never exhibited any signs of remorse upon retrial and never "show[ed] this court any sign or intention of refraining from criminal conduct in the future" (J.A. 35). In addition, the judge stated that she would have sentenced Respondent to more than 20 years at the first trial had Respondent not elected to be sentenced by the jury (ibid.).

2. The Court of Appeals for the Seventh Supreme Judicial District of Texas affirmed Respondent's conviction but vacated his sentence, holding that the increase violated *Pearce* (J.A. 36-42). Distinguishing *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), the court held that the increase in Respondent's sentence at retrial gave rise to a presumption of vindictiveness because that sentence had been imposed by a judge who knew of the first sentence, rather than a jury. The court ruled that the presumption was not rebutted by the judge's findings (J.A. 41). Accordingly, the court resentenced Respondent to 20 years imprisonment, the sentence imposed by the jury at the first trial (J.A. 42). On motion for rehearing, the court reaffirmed its holding that a presumption of vindictiveness applied in this case, deeming it immaterial that Respondent's new trial was granted by the trial judge herself, rather than on appeal (J.A. 44).

3. The Texas Court of Criminal Appeals granted review on its own motion to determine the authority of the court below to reform Respondent's sentence. The court

concluded that, as a matter of procedure, the Court of Appeals should not have reformed the sentence, but instead it should have remanded the case to the trial court for resentencing. The court did not question, however, the holding of the lower court that Respondent's increased sentence violated his right to due process. (J.A. 45-46).

On the State's motion for rehearing, the Court of Criminal Appeals addressed the question whether vindictiveness should be presumed "where a jury assesses punishment at the first trial, and a judge assessed punishment upon retrial" (J.A. 50). The court concluded that "the rule of *Pearce* is that a greater sentence given by a judge after a new trial is presumptively vindictive, and therefore illegal, unless the judge affirmatively bases the increased sentence on identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceeding" [J.A. 48-49 (footnote omitted)]. In so ruling, the court explained that the reasons given in *Chaffin* v. *Stynchcombe*, 412 U.S. at 26-27, for excluding jury sentencing from the *Pearce* rule were not applicable here (J.A. 50-51). The court added that it considered it irrelevant that Respondent could have chosen to be sentenced by a jury and in fact had done so at his first trial, rejecting the State's contention that the *Pearce* presumption does not attach when a different sentencing authority assesses the punishment on retrial.

SUMMARY OF ARGUMENT

I.

The Texas courts properly applied the *Pearce* presumption to this case.

The *Pearce* presumption is engaged whenever there is a hazard that vindictiveness may play a role in resentenc-

ing. *Blackledge* v. *Perry*, 417 U.S. 21 (1974). There was such a hazard in this case.

It made no difference that Respondent got his second trial by filing for a motion for new trial rather than an appeal. Under Texas law, a motion for new trial is a form of post-trial review. When Respondent filed his motion he was attacking the judge for giving him an unfair trial. He faced the same risk that any other defendant challenging a conviction would. He was entitled to the same protection.

Similarly, the fact that a jury imposed the first sentence and the judge the second is of no importance. The judge had a personal and professional stake in the outcome of the case. There was a genuine risk that vindictiveness might play a role in the resentencing process.

Finally, according to the Texas courts, Respondent had a right to freely choose his sentencer at the second trial without fear of vindictiveness. Because of this ruling on state law the Court is unable to reach the question of whether this choice made the *Pearce* presumption inapplicable. Even if this question could be reached, however, it would make no difference. A defendant cannot waive the right to be free from judicial vindictiveness nor can he be forced to forfeit his right to due process of law because he exercised the right to choose his sentencer.

There was a hazard that vindictiveness could play a role in the assessment of Respondent's sentence on retrial. The *Pearce* presumption was properly applied.

II.

The Texas courts properly held that the *Pearce* presumption was not rebutted by the findings made here.

The Court cannot consider this issue. Texas abandoned this argument in the state courts. When this case was presented to the Texas Court of Criminal Appeals the state limited its argument to the issues described earlier. Thus, this question was never presented to the Texas Court of Criminal Appeals. Consequently, it is not properly before the Court. *Ellis* v. *Dixon*, 349 U.S. 855 (1956).

In any event, the decisions below were correct.

A second sentencing authority may justify an increased sentence by relying on relevant conduct or events that occurred after the original sentencing proceedings. *Wasman* v. *United States*, No. 83-173 (July 3, 1984).

That is not what happened here. The trial judge here based her decision on conduct that occurred *before* the first sentencing proceeding but which was not revealed until the second trial. Under the decisions of the Court in *Pearce* and *Wasman* this was not permissible.

Consequently, Texas wants the Court to create a new rule which would allow consideration of this sort of information. The Court should not establish such a rule.

Evidence adduced at second trials will often appear to be more damaging to the defendant. Frequently, however, this will be a matter of appearances only and the evidence will be merely cumulative of information brought out at the first trial. Allowing trial judges to justify sentence increases on the basis of such information would disserve the due process goals of *Pearce*.

It would enable improperly motivated judges to conceal their true motives with ease. Consequently, adoption of the rule Texas seeks would increase the risk that vindictiveness may play a role in resentencing.

Creation of the rule Texas seeks would also resurrect the other evil *Pearce* sought to destroy. Defendants would be deterred in exercising their rights to appeal due to fear of vindictiveness. Access to appellate review would no longer be unfettered.

Because the rule Texas wants would frustrate the due process goals *Pearce* sought to achieve it should be rejected.

Adoption of this rule is not necessary on the ground that without it unjust results will occur. The limited instances in which injustice would be caused through application of existing law are too isolated to justify abandoning the *Pearce* prophylaxis.

ARGUMENT

THE TEXAS COURTS DID NOT ERR IN RULING THAT THE INCREASED SENTENCE ON RETRIAL IN THIS CASE VIOLATED DUE PROCESS.

I. THE TEXAS COURTS PROPERLY APPLIED THE *PEARCE* PRESUMPTION IN THIS CASE.

The first issue in this case is whether the presumption of vindictiveness established by *Pearce* should have been applied below.

Texas says it should not have been because of three reasons.

First, it argues that since the retrial in this case was granted by the trial judge and not an appellate court the presumption should not be used.

Next it contends that because a jury, not the judge, gave the first sentence the presumption does not apply.

Finally it urges that since the Defendant decided to let the judge, not a jury, assess punishment on retrial *Pearce* does not apply.

None of these reasons are significant enough to take this case outside the scope of *Pearce*. None of them provide a reason not to apply the presumption of vindictiveness.

To understand why it is first necessary to review *Pearce* and the way it has been interpreted by this Court.

North Carolina v. Pearce

In *Pearce* the Court said:

> Due process of law, then, requires that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. And since the fear of such vindictiveness may unconstitutionally deter a defendant's exercise of the right to appeal or collaterally attack his first conviction, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge.

North Carolina v. *Pearce*, 395 U.S. 711, 725 (1969).

These considerations led the Court to develop a procedure for the lower courts:

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceedings. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitu-

> tional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726.

Thus, the "presumption of vindictiveness" is something that must be applied by a reviewing court whenever a defendant fights his conviction, gets a new trial and is given a higher sentence the second time. *Id.* at 723, 726.

***Subsequent Interpretation:* Colten *and* Chaffin**

There are, however, certain situations in which there is no need to apply the presumption.

In *Colten* v. *Kentucky*, 407 U.S. 104 (1972), the Court held that the presumption is not necessary in a two-tiered system designed to dispose of minor offenses. There, a defendant could appeal from a conviction in a lower court without alleging any error in the proceedings. *Id.* at 112. A trial de novo was automatic. "The case [was] to be regarded exactly as if it had been brought there in the first place." *Id.* at 113. In order to justify the new trial, a defendant did not need to attack the conduct of the first trial in any manner. Additionally, the court which conducted the second trial and imposed the final sentence was not the court "with whose work Colten was sufficiently dissatisfied to seek a different result on appeal"; a defendant in the Kentucky system was not in the position of asking the first court to "do over again what it thought it had already done correctly." *Id.* at 116-17. Because of these factors, and because of the recognition that the lower courts in the Kentucky system were not "designed or equipped to conduct error-free trials or to insure full recognition of constitutional freedoms," the Court concluded there was no realistic likelihood that vindictiveness could play any part in the Kentucky resentencing scheme. Because there was no risk of vindictiveness, it followed that no defendant would reasonably be deterred from exercising his right to appeal *Id.* at 116.

In *Chaffin* v. *Stynchcombe*, 412 U.S. 17 (1973), the Court did not apply the *Pearce* presumption where a jury assessed the sentence in the second trial. The presumption did not apply for three reasons: (1) the jurors were unaware of the first sentence; (2) the jurors, unlike a resentencing judge, had no reason to try to vindicate the first judge who failed to try the case properly; (3) the jurors, again unlike judges, had no professional interest in the workings of the criminal justice system and would not be inclined to discourage appeals for the sake of efficiency. *Id.* at 27. Because of these factors, there was virtually no chance that a jury would punish defendants for successfully appealing their convictions. Because there was no genuine risk of vindictiveness in the resentencing process, it could not be said that the system would unconstitutionally deter defendants from appealing their convictions. *Id.* at 28.

Thus, the *Pearce* presumption of vindictiveness applies only in those situations where there is a likelihood that vindictiveness may play a part in resentencing and thus deter a defendant from exercising his right to appeal. *Blackledge* v. *Perry*, 417 U.S. 21 (1974). The test to use in determining whether the *Pearce* presumption applies is to ask whether in a given case a defendant runs the *risk* of being penalized for seeking a new trial. *Chaffin*, 412 U.S. at 26. If there is any such hazard, then the *Pearce* presumption should be used.

With this test in mind, the arguments advanced by Petitioner can be addressed.

A. The *Pearce* Presumption Should Apply Regardless Of Whether The Second Trial Follows A Motion For New Trial.

The Petitioner argues that because the Respondent's retrial was the result of his filing a motion for new trial, the presumption should not apply.

After his first trial, Respondent filed a motion for new trial, alleging that the trial court had allowed improper jury argument and allowed the State to use a co-defendant's confession in violation of *Bruton* v. *United States*, 391 U.S. 123 (1963).

In Texas, a defendant may file such a motion only after the trial court has entered judgment against him. *Trevino* v. *State*, 565 S.W.2d 938 (Tex.Crim.App.1978). Through this motion the defendant may challenge the trial verdict by alleging specific types of errors. See Tex. Code Crim. Proc. Ann. art. 40.05 (Vernon 1981 & Supp. 1985).

The Texas courts view the procedure as part of the post-trial review process. The filing of a motion for new trial is not regarded as an incident of the trial itself:

> . . . all trial issues have been decided by the time for the motion for the new trial. That the hearing on such a motion is for the purpose of deciding whether the cause shall be retried (see Arts. 40.01, 40.07, 40.08, U.A.A.C.P.) and to prepare a record for presenting issues on appeal in the event the motion is denied (see Special Commentary to Article 40.09 cited above) demonstrates that it is part of the post-trial review process.

Trevino, 565 S.W.2d at 938.

Thus, McCullough had begun to seek post-trial review of his conviction when he filed this motion. He had challenged the judge for giving him an unfair trial.

As it happened, the judge acquiesced. Respondent's motion was granted. He now faced another trial before the same judge.

Texas argues that there was no hazard of vindictiveness in this situation. It urges that the distinction between a retrial after appeal, as in *Pearce*, and a retrial after a

motion for new trial, as here, is great enough to remove this case from the ambit of *Pearce*.

Texas advances several reasons to support this argument. The Solicitor General briefs them thoroughly. Amicus urges that in the Texas motion for new trial context: (1) the sentencing court is not being asked "to do over again what it thought it had already done correctly" (*Colten*, 407 U.S. at 116, 117); (2) the sentencing judge has not been criticized by another judge; (3) the judge cannot feel burdened by a retrial when it is he who granted the motion that brought it about; (4) there are no institutional biases against retrials in this setting; and (5) the fact that it was the sentencing judge himself who granted the trial "strongly indicates" a fair disposition toward the Defendant. These reasons are not persuasive. In the Texas context the court *is* being asked to "do over again what it thought it had already done correctly" when a defendant files a motion for new trial. Although no judge is criticizing the sentencer the defendant is. The judge's professional interest in conserving resources could easily cause him to feel burdened by a new trial. Finally, although a judge who grants a motion for new trial may have done so out of fairness to the defendant he may also have done it due to fear of an appellate rebuke or to conceal a retaliatory motivation. Thus, none of the reasons advanced are strong.

Moreover, they and the argument they support reflect an overly mechanical approach to the problem. The issue is not whether a list of isolated "factors" makes one case more like another. The issue is whether in this case there was a risk that vindictiveness might play a part in the resentencing process.

Given Respondent's situation the answer must be that there was such a risk. He had to decide whether to attack

the fairness of the judge who had tried his case by filing the motion. Unlike the defendants in *Colten* and *Chaffin* his "slate" would not be "wiped clean" if he succeeded because he would be back before the same court. *Colten*, 407 U.S. at 117. Unlike the defendants in *Colten* and *Chaffin*, he would be before a sentencer who had both reason and opportunity to punish him for exercising his rights. It cannot be said that there was no hazard of vindictiveness in this situation.

There is another flaw in this argument. It overlooks the language of *Pearce* itself. The Court in *Pearce* forbade unjustified sentence increases "after a new trial." *Pearce*, 395 U.S. at 726. The rule was created so that defendants could make free choices using whatever means were available to attack their convictions. *Pearce*, 395 U.S. at 724, citing *Worcester* v. *Commissioner*, 370 F.2d 713 (1st Cir. 1966).

Thus, ". . . the rationale for the rule applies with equal force to defendants considering whether to exercise their right to move for a new trial." *United States* v. *Monaco*, 702 F.2d 860, 884 (11th Cir. 1983) (*Pearce* applies to federal defendants filing motions for new trial).

The argument that *Pearce* should not be applied where the defendant's second trial follows the granting of a motion for new trial is unsound.

B. The *Pearce* Presumption Should Apply Regardless Of Whether The Jury Imposes The First Sentence.

The second argument against applying the *Pearce* presumption here is that because the jury, not the judge, imposed the first sentence, there was no reasonable likelihood of vindictiveness. For the reasons shown below, this argument is incorrect.

This argument is based squarely on the idea that the main reason why a judge would be vindictive in a given case would be his personal stake in the proceedings.

Therefore, the argument goes, when the personal stake of the judge is removed from the proceedings the likelihood that vindictiveness will play any part in the resentencing of the defendant is *de minimis*. Thus, since there would be no realistic likelihood that vindictiveness could occur there would be no need to afford the defendant the protection of *Pearce*.

This argument has no application to the facts of this case. It is true that the first sentence was assessed by a jury and the second by the judge. It is not true, however, that the judge had no personal stake in the outcome of the case.

Here, the defendant had asked the same judge to "do over again what [she] thought [she] had already done correctly" (*Colten*, 407 U.S. at 117). He had attacked her ability to try his case fairly.

The trial judge here actually had a greater personal stake in the outcome of the case than the judge in *Pearce*. Unlike *Pearce*, here it was the same judge whose first sentence had been overturned that was being asked to assess punishment after the second trial. See *Hardwick* v. *Doolittle*, 558 F.2d 292, 299 n.3 (5th Cir. 1977).

This argument must be rejected.

C. The *Pearce* Presumption Should Apply Regardless Of Whether The Defendant Chose To Have The Judge Assess Punishment On Retrial.

The final argument against applying the *Pearce* presumption in this case is that here the defendant himself

chose to be sentenced by the judge whom he had previously attacked.

This argument is unsound for two reasons.

First, it cannot be considered by the Court. This Court is bound by decisions of state courts on matters of state law. *Herb* v. *Pitcairn*, 324 U.S. 117 (1945). In Texas, Article 37.07 (2)(b) of the state Code of Criminal Procedure gives the defendant the right to elect whether judge or jury will assess his punishment (J.A. 54). The Texas Court of Criminal Appeals has previously construed this provision to mean that "as long as the legislature allows defendants to elect between jury or judge punishments, defendants should be allowed to make that choice without fear of vindictiveness", *McCullough* v. *State*, No. 351-83, Dec. 5, 1984 (Tex.Crim.App.) (on State's Motion for Rehearing) (J.A. 52). This is nothing if not a state court decision on a question of state law. Consequently, inquiry into this issue is foreclosed by established principles of judicial review.

Even if inquiry could be made, however, the argument would have to be rejected.

To see why it is necessary to consider the true nature of this position. The idea that giving a defendant the right to choose his sentencer should prevent the application of *Pearce* is unique. It does not derive from a theory that the opportunity for such a choice removes a likelihood that vindictiveness may play a part in resentencing. It is instead based on a "waiver" analysis:

> . . . to the extent respondent was exposed to any danger of vindictive sentencing it was solely as a result of his choice of sentencer. Respondent could have avoided any possibility of vindictive sentencing simply by choosing to be sentenced by the jury, as he had done at the first trial.

(Brief of Solicitor General, 18-19).

This argument is wrong.

It asks the Court to condone a situation in which a defendant would forfeit his right to be free from vindictiveness because he exercised the right to choose his sentencer. This sort of "trade-off" is not constitutionally permissible. In *United States* v. *Jackson*, 390 U.S. 570 (1963), the Court condemned such an arrangement when it held that the federal kidnapping statute was unconstitutional because it made death the price of a jury trial:

> Under the Federal Kidnapping Act, therefore, the defendant who abandons the right to contest his guilt before a jury is assured that he cannot be executed; the defendant ingenuous to seek a jury acquittal stands forwarded, that if the jury finds him guilty and does not wish to spare his life, he will die. Our problem is to decide whether the Constitution permits the establishment of such death penalty applicable only to those defendants who assert the right to contest their guilt before a jury. The inevitable effect of any such provision is, of course, to discourage assertion of the Fifth Amendment right not to plead guilty and to deter exercise of the Sixth Amendment right to demand a jury trial. If the provision had no other purpose or effect than to chill the assertion of constitutional rights by penalizing those who choose to exercise them, then it would be patently unconstitutional.

Id. at 577.

To hold that *Pearce* does not apply when a defendant can choose his sentencer would be to create the same sort of situation denounced in *Jackson*.

Moreover, the Court has made it unmistakably clear that vindictiveness must play no role in the criminal trial process. *Pearce*, 395 U.S. at 724. To legitimize it on the ground that the defendant asked for it, which is what this argument wants the Court to do, would be repugnant to the principle of due process.

This argument must be rejected.

II. THE TEXAS COURTS PROPERLY HELD THAT THE *PEARCE* PRESUMPTION WAS NOT REBUTTED BY THE FINDINGS HERE.

The second major question presented by this case is whether the *Pearce* presumption may be rebutted by evidence of a defendant's conduct before his first trial which is brought out at his retrial.

All of the reasons used to justify the sentence increase here were based on such evidence. (J.A. 33-35).

Texas argues that resentencing courts should be permitted to do this.

Before reaching this argument, however, it must be noted that this position cannot be considered by the Court because Texas has waived its right to present it.

This argument was not presented to the Texas Court of Criminal Appeals. Under Texas procedure, both the state and the appellant may appeal to the Court of Criminal Appeals by filing a petition for discretionary review. See Tex. Code Crim. Proc. Ann. art. 44.45 (Vernon 1981, Vernon Supp. 1985). The Court may also grant review on its own motion. *Ibid.* Here the Court of Criminal Appeals reviewed the case on its own (J.A. 45-46). The state chose not to contest the decision of the Court of Appeals until it filed a motion for rehearing:

> The question presented on state's motion for rehearing is whether the presumption of vindictiveness established by *North Carolina* v. *Pearce*, (citation omitted) . . . is applicable where a jury assesses punishment at the first trial, and a judge assesses punishment upon retrial.
>
> * * *
>
> The state does not contend on rehearing that the trial court's findings of fact in support of the increased sentence satisfy *Pearce* (citation omitted). Rather, the state asserts that *Pearce* is inapplicable when a jury first assesses punishment and a judge subsequently assesses punishment upon retrial.

(J.A. 50). Because the issue was not presented to the Texas Court of Criminal Appeals, the question is not properly before this Court and should not be considered. *Ellis* v. *Dixon*, 349 U.S. 458 (1955), rehearing denied, 350 U.S. 855 (1956).

Assuming arguendo that Petitioner's argument can be considered it must be rejected nonetheless.

To understand why it is first necessary to review the decisions of the Court in *Pearce* and *Wasman* v. *United States*. No. 83-173 (July 3, 1984).

From Pearce *to* Wasman

It must be remembered that the rule of *Pearce* was created to fight two evils in the resentencing process: vindictiveness and the fear a defendant may have of vindictiveness. *Pearce*, 395 U.S. at 725.

To prevent these problems the Court mandated this rule:

> In order to assure the absence of such a motivation, we have concluded that whenever a judge imposes a more severe sentence upon a defendant after a new

> trial, the reasons for his doing so must affirmatively appear. Those reasons must be based upon objective information concerning identifiable conduct on the part of the defendant occurring after the time of the original sentencing proceedings. And the factual data upon which the increased sentence is based must be made part of the record, so that the constitutional legitimacy of the increased sentence may be fully reviewed on appeal.

Id. at 726.

Experience has proven the language in *Pearce* concerning the kind of information which may be considered to be cumbersome.

Thus, in *Wasman* the Court interpreted and re-defined the rule.

There, the defendant was convicted of criminal passport violations and sentenced to two years confinement, six months to be served and the rest suspended in favor of three years probation. At the time of the original sentencing, Wasman had pending against him charges involving the possession of counterfeit certificates of deposit. At the sentencing hearing on the first conviction, the trial court was careful to note that it was not taking into consideration the pending charges. *Wasman*, slip op. 2.

After his first conviction was reversed, Wasman was retried, convicted and sentenced to two years in prison. The trial judge noted that while he had not considered the pending charges before, he would consider them at the second hearing because they had ripened into a conviction. *Id.* at 3.

Wasman argued on appeal that his sentence increase was void. He urged a narrow construction of the *Pearce*

language, arguing that it allowed consideration only of misconduct between trials. *Id.* at 4.

The Court of Appeals disagreed and held that such a rigid limitation would needlessly erase relevant information from the sentencing slate, while contributing nothing to the goal of avoiding vindictiveness. An intervening conviction, said the Court of Appeals, adds a new dimension to the data before a sentencing judge *who had disregarded charges already pending* at the time of the earlier sentencing hearing. *Wasman* v. *United States*, 700 F.2d 663, 670 (11th Cir. 1983).

On certiorari, the Court agreed. The Court held that:

> . . . after retrial and conviction following a defendant's successful appeal, a sentencing authority may justify an increased sentence by affirmatively identifying relevant conduct or events that occurred subsequent to the original sentencing proceedings.

Wasman, slip op. 9.

Under the *Wasman* holding the findings entered here are insufficient to rebut the presumption of vindictiveness, since none of them are based on objective information related to conduct or events occurring subsequent to Respondent's original sentencing. (J.A. 33-35). All of the "findings" relate to events which occurred before the first sentencing. With one exception—finding number two—they are all based on subjective impressions rather than objective data. (J.A. 33-35).

What Texas Wants

What Texas seeks is the creation of a new rule which would make these "findings" sufficient. This rule would allow the resentencing authority to justify an increased sentence by reliance on events which occurred *before* the

original sentencing proceedings but were not evidenced until the second trial. The Court should neither create such a rule nor approve what happened in this case. To do so would resurrect the problems *Pearce* tried to solve. Further, the creation of such a rule is not necessary to prevent unjust results from occurring.

To understand why this is true it is first necessary to look at some realities of the criminal trial process in general and this case in particular.

Some Realities of the Trial Process

As the Court has noted, by the end of a defendant's first trial the authorities have likely "discovered and assessed all of the information against an accused and [have] made a determination . . . of the extent to which he should be prosecuted." *United States* v. *Goodwin*, 457 U.S. 368, 381 (1982).

Nonetheless, the prosecution will frequently be able to present a stronger case at the second trial. By then, the accused will have revealed his defenses. Evidence favorable to him will be in the hands of the prosecutors. The prosecution will be more prepared. Its witnesses will be more at ease. Their courtroom presentations will be more persuasive.

Consequently, by the end of the second trial the record will often appear to weigh more heavily against the defendant.

Frequently, this will be a matter of appearances only. Often, the damaging evidence adduced at the second trial will only be cumulative of the evidence brought out the first time.

This is what happened here. A close examination of the records of both trials reveals that there were virtually no differences from one trial to the next in the testimony concerning Respondent's conduct.

The state did present two new witnesses at the second trial. These witnesses testified that McCullough admitted to them that he had cut the victim's throat (Vol. 1, second trial, p. 133, 140 and 150). This was not new information. It only corroborated testimony from the first trial (Vol. 1, first trial, p. 258).

The only other "new" fact about McCullough's conduct which came out at the second trial was his admission that he had been out of prison only four months before he committed the crime (Vol. 1A, second trial, p. 230). Analysis of the record from the first trial reveals that this same information was presented, albeit differently, at that time (Vol. 2, first trial, p. 347). Analysis of the record also shows that in any event all this information was known to the state at the first trial.

Essentially, then, the prosecutors managed to put together a stronger case against McCullough at his retrial. It was not a new case. It was only a case that looked better because it was a rehash of the first.

Of course, some cases may become considerably stronger than this one did when retried.

These situations will occasionally arise. Nonetheless, common experience teaches that normally the prosecution will have presented its complete case against an accused by the end of the first trial. *Goodwin*, 457 U.S. at 381. The sort of situation discussed here would occur infrequently.

With this context in mind it is possible to consider the arguments against creating the rule Texas wants.

A. If The Court Adopts The Rule Texas Wants There Will Be A Greater Likelihood That Vindictiveness Will Play A Role In Resentencing.

If a resentencing judge is allowed to increase a defendant's sentence solely on the basis of information brought out at his second trial there will be a greater likelihood that actual vindictiveness will infect the sentencing process than there is now.

As discussed earlier, the evidence brought forth at a second trial will often appear to be more damaging to the defendant.

Thus, it would be easier for a judge bent on vindictiveness to conceal his motives by claiming that the cumulative evidence shed new light on a defendant's "life, health, habits, conduct, and mental and moral propensities." *Pearce*, 395 U.S. at 723.

It takes little imagination to see how easily an improperly motivated judge could cloak his retaliatory design by relying on such "findings."

Such findings would often be vague. Here, for example, the trial judge partially justified the stiffer sentence on the basis of the "fact" that Respondent "showed no remorse" at the second trial (J.A. 35). Such a "fact" could easily be used as a veil to conceal vindictiveness.

It would be extremely difficult to disprove such a "finding" on appeal, particularly in view of the deference normally paid trial courts by appellate tribunals. *Pearce*, 369 U.S. at 725.

The task of determining the sufficiency of such findings on appeal would be great. Undoubtedly a tangled skein of conflicting decisions as to what factors were sufficient would develop. Confusion and disharmony would occur.

In addition, the chore of sifting through and comparing various trial records would add to the increasing burdens now imposed on state and federal appellate courts.

The net effect of adopting the rule Texas wants would be to increase opportunities for judicial vindictiveness. One of the evils this Court sought to combat in *Pearce* would return.

B. If The Court Adopts The Rule Texas Wants Defendants Will Be Hampered In The Exercise Of Their Right To Appeal.

If the rule Texas desires becomes law another evil *Pearce* sought to destroy will return. Defendants will be deterred from exercising their rights to appeal.

If the Court adopts the rule Texas wants there will be greater dangers of vindictiveness than before. Consequently, defendants will tend to be deterred from challenging their convictions. *Blackledge*, 417 U.S. at 29.

This problem has always been of great concern to the Court:

> Under our constitutional system it would be impermissible for the sentencing authority to mete out higher sentences on retrial as punishment for those who successfully exercised their right to appeal or to attack collaterally their conviction. Those actually subjected to harsher resentencing as a consequence of such motivation would be most directly injured, but the wrong would extend as well to those who elect not to exercise their rights of appeal because of a legitimate fear of retaliation. Thus, the Court held that fundamental notions of fairness embodied within the concept of due process required that convicted defendants be "freed of apprehension of such a retaliatory motivation."

Chaffin, 412 U.S. at 24-25.

If the rule Texas wants becomes law, look at the situation in which a defendant who must decide whether to appeal his case will be placed. If he succeeds and gets a new trial it is entirely possible that the State may prove a slightly stronger case against him the second time. Then, this "stronger" (but not new) testimony might be seized upon by the judge to justify a sentence increase. Perhaps it will be said that he showed no remorse at the second trial. Perhaps it will be claimed that the evidence showed that he was a worse person than thought before. Would a defendant, even one whose first trial was fundamentally flawed and whose rights had been egregiously violated, think twice before deciding to appeal? Certainly.

If the rule Texas wants becomes law the decision to appeal will become a hard one. Few defendants will want to gamble on whether a few additional details will be brought out at a retrial and used against them.

The social consequences of such a situation would be grave. Access to the courts would be impeded. Trial courts would make more errors. Appellate courts would make fewer decisions. The steady progress of the law would be slowed and the meaning of it lessened. The situation would be intolerable.

C. Adopting The Rule Texas Wants Is Not Necessary To Avoid Unjust Results.

Texas urges the Court to adopt the rule it advocates because it claims that if the Court does not then unjust results will occur.

The Solicitor General makes this argument forcefully in his amicus brief. He poses a hypothetical problem: suppose a defendant has been sentenced to a light punishment, perhaps even probation, as a first offender. He

appeals, wins, and gets a new trial. Before he is resentenced it is learned that he has been using an alias and in reality has a lengthy criminal record (Brief of Solicitor General, 26).

Amicus argues that unless the new rule Texas seeks is adopted this sort of defendant would be able to hide behind *Pearce*. Limiting his punishment to what he received at his first trial, it is said, would be unjust.

It would be. This kind of injustice, however, would not occur under present law. This is because the hypothetical defendant's continuing perjury as to the extent of his record would itself be an "event" occurring subsequent to his first trial. Under *Wasman*, the resentencing judge would be perfectly justified in increasing the sentence in such a situation.

The second hypothetical presents a harder problem.

In this case, the defendant is given a light sentence after the first trial because he is thought to have played only a minor role in the crime. On retrial, new evidence shows that he was a primary force behind it. (Brief of Solicitor General, 26).

This kind of case, as shown earlier, will occur infrequently. When it does, however, it presents a serious problem.

Amicus argues that unless the Court creates the rule Texas wants this sort of defendant will escape just punishment. Amicus is correct to some extent. Under present law, the resentencer in this kind of case would be forbidden to increase the sentence. The goal of rational sentencing—to mete out punishment which fits the offender (See *Williams* v. *New York*, 337 U.S. 241, 245 (1949)—would be frustrated in this rare instance. Certainly, to allow this

to happen in these limited situations would be to do an injustice.

But to create the rule urged by Texas would do a greater injustice. As shown above, allowing a sentencing court to use evidence adduced at the second trial alone as a justification for a stiffer sentence would be to resurrect the evils *Pearce* sought to bury. By returning the risk of vindictiveness to sentencing, the integrity of the entire trial process would be compromised. See *Michigan* v. *Payne*, 412 U.S. 47 (1973).

Countless defendants—many unfairly tried—would decide not to challenge their convictions since the new trial might afford a vindictive judge some justification for a sentence increase. *Chaffin*, 412 U.S. 24-25.

Trial courts, no longer subjected to appellate scrutiny, would err and err again. All the injustices *Pearce* sought to correct would return with a vengeance.

The Court must make a choice. It can retain existing law under *Pearce* and *Wasman* with the understanding that an occasional injustice might occur, or it can create the rule Texas wants and do a much greater injustice.

CONÇLUSION

The judgment of the Texas Court of Criminal Appeals should be affirmed.

Respectfully submitted,

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